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No. 00-112

(Cross Petition No. 00-5800)

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2000

COLORADO DEPARTMENT OF CORRECTIONS, and MARGARET HEIL, in her individual and official capacity,

Petitioners,

vs.

JOHN H. CHAMBERS,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I. REVIEW IS NECESSARY BECAUSE THE OPINION CONFLICTS WITH DECISIONS REACHED BY THIS COURT

Chambers argues that this case is not worthy of review because it does not conflict with decisions from other circuits. He ignores the fact that it conflicts with numerous decisions of this court which hold that prison classification decisions are solely within the purview of prison officials.

In addition to being expensive and time-consuming, this expansion of prisoner rights will have adverse consequences on

prison administrators throughout the country.[1] Prisons in every state reward participation in rehabilitative programs with sentence reduction credits. Those credits are not awarded automatically. The inmates must earn those credits by successfully completing the programs. If that requirement is sufficient to create due process rights, hearings will be required prior to imposition of rehabilitation requirements in a wide variety of contexts. For example, an inmate who is required to take alcohol classes may cite this decision for the proposition that he cannot be labeled an alcoholic without a hearing when he has never been convicted of a crime related to alcohol abuse. An inmate required to take drug prevention treatment will cite the decision because the stigma of "drug user" cannot be attached to him without a prior conviction of a crime related to drug use. The illiterate inmate will claim it is unfair to stigmatize him if his lack of education did not cause the crime for which he is incarcerated. A hearing might be required before requiring anger management classes of an inmate who did not commit a crime of passion.

By far the most likely scenario is a host of suits by inmates who contest their classification as violent offenders after conviction of non-violent offenses, even if the prison considers them to be dangerous. Inmates will cite *Chambers* in support of their argument that they cannot be stigmatized in such a manner without prior due process. Such an argument would conflict with *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) and *Sandin v. Conner* but would be perfectly consistent with the position taken by

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[1] Chambers's suggestion that the decision will not have an adverse impact on increased inmate litigation has already been proven wrong. In an unpublished decision, the Tenth Circuit cited *Chambers* for the proposition that even a *convicted* sex offender is entitled to process prior to removal from a sex offender treatment program for misconduct. *Beierle v. Zavares* (10th Cir. June 12, 2000). Inmates dissatisfied with the rulings at their post-*Chambers* administrative hearings will certainly seek judicial review of the decision and the process used.

the Ninth and Tenth circuits concerning the "stigma" attached to the label of sex offender in prison.[2]

Chambers's reassurance that this decision will not lead to increased inmate litigation is belied by his own conduct in this case. After losing in Chambers I and Chambers II, he attacked the same prison policy, using the same arguments, in Chambers III. His blatant forum shopping has been rewarded by the Tenth Circuit. Repetitious inmate litigation has prevailed because Chambers III nullified the results of Chambers I and II.

While ignoring the substance of the CDOC's *collateral estoppel* and *res judicata* arguments,[3] Chambers posits the incorrect conclusion that a prevailing party, in this case the CDOC, must cross-appeal every adverse ruling or lose its ability to raise its defenses. He fails to explain why a-party whose motion to dismiss was granted would file a cross-appeal. The District Court's denial of

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[2] This case has nothing to do with labeling or registration of convicted sex offenders after release. Colorado's sex offender registration statute applies only to convicted sex offenders. *Jamison v. People*, 988 P.2d 177, 179 (Colo. App. 1999). Chambers will not be required to register as a sex offender. His case solely concerns an *internal* classification used by the CDOC, while Chambers is incarcerated, to guide its rehabilitative decisions.

[3] Contrary to Chambers's claim, the Tenth Circuit never considered these issues. In its initial remand for additional findings, it merely indicated that it would consider the issue after remand. Appendix E at pages 3-4. In the final decision, the issues were ignored by the appellate court in order to reach the "merits" of the dispute. Indeed, not even the District Court analyzed the issues, other than to say that res judicata did not apply. The District Court never addressed collateral estoppel because Chambers did not assert the earned time issue that he had lost in Chambers I until his newly appointed attorney raised the issue for the first time in a supplemental brief before the Court of Appeals in Chambers III. That supplemental brief was not filed until the parties had filed opening, answer, and reply briefs in the appellate court.

the CDOC's motion for summary judgment on issue preclusion was accompanied by a *grant* of the CDOC's motion to dismiss.

It is incorrect to argue that the CDOC must appeal a denial of one early dispositive motion when it prevails in full on another dispositive motion filed at the outset of the case. If prevailing parties must cross-appeal every adverse ruling even though they obtain all the relief they requested, the dockets of the nation's appellate courts will be clogged beyond recognition. A more logical ruling is the one that has governed appellate practice since the inception of this country: an appellate court may affirm a district court's order on *any* grounds supported by the record, including grounds not relied upon by the district court when it dismissed the complaint. *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n. 20 (1979). *See* Appendix E at page 4.

II. CHAMBERS IS NOT ENTITLED TO JUDICIAL REVIEW OF THE PRISON'S INTERNAL CLASSIFICATION PROCESS

Chambers argues that prison officials should not have unfettered discretion over internal prison classification decisions. Instead, he believes that judges and lawyers should be permitted to second-guess those decisions. He provides no support for the argument, other than his own subjective belief that his classification is "unfair".

The Due Process Clause does not create any entitlement to a particular inmate classification. *Moody v. Daggett*, 429 U.S. 78, 88 n.9, 97 S. Ct. 274, 50 L.Ed.2d 236 (1976). The State has the power to classify inmates without any need for justification. *Id.*; *Meachum v. Fano*, 427 U.S. 215 (1976); *Montayne v. Haymes*, 427 U.S. 236, 242, 96 S. Ct. 2543 (1976); *Milligan v. Colorado Dept. of Corrections*, 751 P.2d 75, 76 (Colo. App. 1988); *Andretti v. Johnson*, 779 P.2d 382, 384 (Colo. 1989). These precedents affirmed dismissals of complaints because inmates are not entitled to judicial review of security classifications and/or placement. The precedents are clear: the

opinions and decisions of state prison officials in the area of internal classification of inmates while they are incarcerated *is* unfettered. *See also Olim v. Wakinekona*, 461 U.S. 238, 249-50, 103 S. Ct. 1741 (1983) (a state prison's decision over interstate transfers of its prisoners is "completely unfettered"); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 282-83, 118 SCt. 1244 (1998) (Commutation and pardon decisions are traditionally left to the complete or unfettered discretion of the Governor and are not subject to judicial review).[4]

The Due Process Clause does not grant jurisdiction to federal courts to superimpose their beliefs about the fairness of those state decisions. *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668 (1990). Courts should not interfere with the administration of prisons merely because they personally believe a prison practice is "unfair" or "harsh". *Sandin v. Conner*, 515 U.S. 472, 482-84, 115 S. Ct. 2293 (1995); *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 229 (1977); *Hewitt v. Helms*, 459 U.S. at 467. To infer a liberty interest beyond the bounds of the Due Process Clause "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano*, 427 U.S. at 225.

Prison classification of inmates is an area traditionally left to the unfettered discretion of state officials. It should remain that way.

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[4] Chambers objects to "unfettered" discretion over classification but fails to indicate what fetters should be imposed or where the line should be drawn. Where before classification was exclusively a matter for the exercise of discretion of prison administrators only, Chambers argues that courts, inmates and their lawyers should be permitted to intrude in internal prison decision-making. This is contrary to this court's repeated statements of its desire that internal prison administration be left to the experts who administer the state prisons. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Lewis v. Casey*, 518 U.S. 343, 362, 116 S.Ct. 2174 (1996), ; *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

It is the federal courts' desire to superintend the operation of state prisons that needs to be limited, especially in the area of internal inmate classification, which has traditionally been left to the states to control. *Cf. United States v. Lopez*, 514 U.S. 549, 564, 115 S.Ct. 1624 (1995) (federal power to regulate commerce is not unlimited, particularly in areas in which the states have traditionally been sovereign.).

III. THERE IS NO PRESUMPTION OF ENTITLEMENT TO CREDITS

Chambers's entire case is built around his erroneous premise that grants of earned time awards are presumed unless the inmate does something to lose them. Colorado's earned time credit statutes demonstrate conclusively that Colorado's program is not based on the presumption of "earned time *unless*..." Instead, the statutes permit grants of "earned time *only if*..." the state chooses to award the credits. Five separate parts of the earned time statutes indicate that the decision to grant credit if the inmate shows progress in rehabilitation is a discretionary one.

First, § 17-22.5-302 (3) states that the determination to award credit shall be made "consistent with" the remaining provisions of the statute. Second, subsection (1) states that earned time "may" be deducted. Therefore, the statute lacks any "requisite relevant mandatory language." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 464 (1989). Third, the statutes do not specify which programs the inmate shall be required to take in order to obtain credits. There is no indication that rehabilitation programs must be based upon the offense for which the inmate is incarcerated. The CDOC is not precluded from requiring an inmate to participate in an SOTP without a prior sexual conviction. Fourth, the CDOC has the final say whether the inmate has made a satisfactory demonstration of "substantial and consistent progress." Finally, even if consistent progress is shown in "each" of its four rehabilitation categories, an earned time credit shall be awarded "not to exceed" a maximum number. The only limitation on agency discretion is the establishment of a cap which the CDOC cannot

exceed. No minimum number is mandated, even if the inmate progresses. Such unfettered discretion cannot create an entitlement. Even the Tenth Circuit has rejected Chambers's argument. *Templeman v. Gunter*, 16 F.3d 367, 370 (10th Cir. 1994) (Although one portion of Colorado's earned time statute appears to be mandatory in nature, the statute creates no entitlement because the overall text demonstrates that the prisoner must satisfy criteria established by the CDOC). Chambers refuses to satisfy that criteria. He is not entitled to credit that he has not earned.

Contrary to the Tenth Circuit's conclusion that the CDOC was taking away a benefit from Chambers, the record shows that no credits previously awarded to Chambers were withdrawn. He merely stopped receiving additional credits each month prospectively. Earned time credits must be earned by inmates; they are not given as a benefit, nor do inmates have a legitimate expectation that they will receive them.

CONCLUSION

The decision has altered the federal-state relationship by imposing a new requirement for judicial review of internal prison classification and rehabilitation decisions. If left unchecked, the decision will affect all state prisons. Those ramifications are as important as those which caused certiorari to be granted in *Sandin v. Conners*. Colorado respectfully petitions the Court to correct this disturbing interference with its internal prison administration.

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